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No. 05-1323

IN THE

Supreme Court of the United States

UGI UTILITIES, INC.,
Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Second Circuit has decided a question that this Court expressly left unresolved in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004): whether a party potentially responsible for environmental cleanup costs can recover those costs from other potentially responsible parties (PRPs) under § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a)(4)(B). Remarkably, respondent concedes that this issue is important (Br. in Opp'n 4) and eschews offering a defense of the Second Circuit's erroneous treatment of it (*id.* at 8). This Court should now definitively resolve the issue because (i) the Second Circuit's decision conflicts with the holdings of ten other circuits (Pet. 10-12; *infra*, 4); (ii) it is inconsistent with CERCLA's text, structure, and legislative history (Pet. 12-17); and (iii) it involves a matter of recurring importance to the proper administration of CERCLA (*id.* at 14-16, 24).

1. As the United States has again advocated, the Second Circuit's decision cannot be reconciled with the decisions of other courts of appeals, and it misinterprets CERCLA in a way that interferes with the statute's cleanup scheme. Since the filing of the petition, the United States has submitted to the Seventh Circuit an amicus brief on behalf of both the Environmental Protection Agency and the Department of Justice addressing the § 107 issue presented here. As the Government there explains, because Congress tasked the President (and his delegate, the EPA) with administering CERCLA's "Superfund" program for environmental cleanup, "the United States has a substantial interest in assuring that CERCLA is interpreted in a way that promotes efficient and effective cleanup of hazardous waste sites." Brief of United States as Amicus Curiae at 1, *Metro. Water Reclamation Dist.* v. *N. Am. Galvanizing & Coatings, Inc.*, No. 05-3299, 2006 WL 1354188, at *1 (7th Cir. May 2, 2006) [hereinafter

U.S. *Metro.* Br.], also available at www.ca7.uscourts.gov/briefs.[1] This "substantial interest" in cleanup drives the Government's interpretation of CERCLA and demonstrates the fallacy in respondent's suggestion (Br. in Opp'n 8 n.9) that the Government's views should be ignored as "part of a broader litigation strategy designed to avoid paying cleanup costs altogether" (*id.*). To the contrary, the EPA's interpretation of CERCLA should be afforded deference. *Cf. Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U. S. 837 (1984).

In its amicus brief, the Government reaffirms its position that the Second Circuit's decision here is "wrong because it frustrates the comprehensive scheme Congress created in section 113(f)[, 42 U.S.C. § 9613(f)]." U.S. *Metro.* Br. at 18, 2006 WL 1354188, *18. As the United States explains, Congress purposely designed § 113(f)'s contribution remedy "to encourage quick and effective resolution of environmental disputes . . .[,] avoid the threat of disproportionate liability, . . . [and] provide[] for prompt replenishment of the Superfund." *Id.* at 18-19, 2006 WL 1354188, at *18-19 (citations and internal quotations omitted). Before a PRP can sue under § 113(f), it must either resolve its CERCLA liability with a federal or state enforcement agency or have already been sued by such an agency. 42 U.S.C. §§ 9613(f)(1) & 9613(f)(3)(B). And PRPs that resolve their liability to the United States or a state are not liable for contribution under § 113. 42 U.S.C. § 9613(f)(2). As the Government's amicus brief states, by allowing PRPs that clean up "voluntarily,"

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[1] In soliciting the views of the EPA, the Seventh Circuit emphasized the importance of the issue presented here: "Because resolution of [the § 107] issue could have a significant impact on the administration of the Nation's environmental policies, as set forth in federal statutory law, the court invites the Environmental Protection Agency to submit a brief as amicus curiae on the appropriate interpretation of section 107." Order, *Metro. Water Reclamation Dist.* v. *N. Am. Galvanizing & Coatings, Inc.*, No. 05-3299 (7th Cir. Jan. 23, 2006) (inviting EPA to submit amicus brief).

i.e., without having been sued by, or settled with, the United States or a state, to sue other PRPs under § 107(a), the Second Circuit's decision "significantly undercuts the incentive for responsible parties to settle with the government provided by the contribution protection provision of section 113(f)(2)." U.S. *Metro.* Br. at 20, 2006 WL 1354188, at *20.

The United States' amicus brief also refutes respondent's suggestion that there is "no 'split' in the circuits" (Br. in Opp'n 7) on whether PRPs can recover under § 107(a). As the Government counsels, no other circuit is in accord with the Second Circuit: "Under binding Seventh Circuit authority, claims brought by PRPs sound in contribution and must be brought pursuant to section 113 of CERCLA. A total of nine[2] courts of appeals have reached the same conclusion." U.S. *Metro.* Br. at 5, 2006 WL 1354188, at *5 (citations omitted). And, unlike respondent's attempt to downplay the Second Circuit's admitted conflict with the Ninth Circuit, the Government's brief emphasizes it: "the Second Circuit acknowledged that its interpretation of sections 107 and 113 conflicts with the Ninth Circuit's holding in *Pinal Creek* [*Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997)] and with the First Circuit's decision in *United Techs.* [*Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994)]." U.S. *Metro.* Br. at 14, 2006 WL 1354188, at *14. Highlighting further the conflict with the First Circuit, the Government explains that the Second Circuit's attempt to limit its § 107(a) claim to PRPs that have "voluntarily incurred response costs . . . is inconsistent with the statute" and was rejected by the First Circuit "as a 'sleight of hand.'" *Id.* at 16, 2006 WL 1354188, at *16 (quoting *United Techs.*, 33 F.3d at 102).

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[2] Now ten, *see infra*, 4.

2. Although the Second Circuit issued the decision after *Cooper Industries*, that fact does not avoid the circuit conflict it acknowledges or minimize the importance of the § 107 issue. Respondent contends that there is no circuit split because only the Second Circuit has ruled on the § 107 issue post-*Cooper Industries*. Br. in Opp'n 7. In *Cooper Industries*, however, the Court declined to reach the § 107 issue, and left in place, pending further examination, the courts of appeals' decisions holding that PRPs cannot sue under § 107(a). 543 U.S. at 169. The Second Circuit's decision conflicts with those courts' decisions holding that a PRP can only recover its cleanup costs through a § 113(f) contribution claim.

Respondent does not take issue with the merits of these conflicting holdings. Instead, it quotes the *Cooper Industries* dissent to "refute petitioner's contention that the Second Circuit's ruling . . . departs . . . from the statutory text." Br. in Opp'n 9. Respondent's reliance on that dissent is remarkable for two reasons. First, even while relying on it, respondent fails to acknowledge that the dissent urged that the § 107 issue was sufficiently important for the Court to resolve last Term, even though the courts below had not ruled on the issue and the parties had not briefed it. Second, respondent champions the dissent's interpretation of CERCLA's text while ignoring the mistaken modification of that text in the quote, which, as the petition explains, materially alters the statutory meaning (*see* Pet. 25-26).

3. The Fifth Circuit now also has ruled that, contrary to the decision below, PRPs have no § 107(a) cost recovery claim, but PRPs continue to litigate that issue across the Nation. The Fifth Circuit, in a recent ruling that PRPs are not subject to joint and several liability for contribution, held, "[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under §107(a)." *Elementis Chromium L.P.* v. *Coastal States Petroleum Co.*, No. 04-20519, 2006 WL 1453054, at *4 (5th Cir.

May 26, 2006). In so holding, the Fifth Circuit expressly followed the Eleventh Circuit's decision in *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1513 (11th Cir. 1996), one of the decisions in the nine other circuits that had previously interpreted CERCLA not to allow PRPs to sue under § 107(a). *See* Pet. 10-11. Thus, the Fifth Circuit has now joined those circuits whose decisions conflict with the Second Circuit's decision in this case.

The Fifth Circuit's ruling, which neither mentions *Cooper Industries* nor confronts the Second Circuit's novel "voluntary PRP" construct, is unlikely to decrease the rate at which PRPs across the Nation are seeking recovery under § 107(a) as a result of *Cooper Industries*' reading of the statutory limitations on § 113(f) contribution claims. PRPs precluded from recovering under § 113(f) have increasingly looked to § 107(a) as a means of recovering their cleanup costs from other PRPs. In affording some PRPs such a remedy, the Second Circuit has emboldened those efforts. One need only review the KeyCite report for the Second Circuit's decision to see that over thirty-five briefs in nineteen cases have already invoked the decision in the nine months since it issued. Many of those briefs seek a § 107(a) remedy despite contrary controlling decisions issued pre-*Cooper Industries*. As both petitioner and respondent have noted, some lower courts appear eager to find a § 113(f) workaround, including, most recently, the District of Kansas. *See Raytheon Aircraft Co.* v. *United States*, No. 05-2328-JWL, 2006 WL 1517762, at *9 n.9 (D. Kan. May 26, 2006) (mentioning Second Circuit decision as "significant" and concluding that a PRP that does not qualify for a § 113(f) contribution claim has instead an implied right of contribution under § 107).[3]

Respondent acknowledges that the issue presented here is currently at stake in cases pending on the dockets of at least four courts of appeals and numerous district courts. Br. in

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[3] *See also* Pet. 26-28 & nn.14-15 (collecting other cases).

Opp'n 6 & nn.5-6; *see also* Pet. 26-28 & nn.13-15. Thus, even were respondent correct in characterizing the Second Circuit's decision as an index case, one having no relationship to the previous appellate decisions with which its § 107 holding conflicts, the paramount federal interests involved weigh heavily against leaving the issue to be adjudicated seriatim by the lower courts.

4. Whether PRPs can recover under § 107(a) was decided below and is properly presented by the petition. Contrary to respondent's effort to portray the Second Circuit's decision as insubstantial or incomplete (*see* Br. in Opp'n 3-4), that decision resolved the paramount statutory interpretation questions left open in *Cooper Industries*. The court ruled, *first*, that some PRPs can recover their cleanup costs under § 107(a) (Pet. App. 16a-17a); *second*, that § 107(a) affords those PRPs an express cause of action (*id.* at 14a-15a); *third*, that the cause of action entitles those PRPs to recover their cleanup costs jointly and severally from other PRPs (*id.* at 15a & n.9); and, *fourth*, that the cause of action survives unaffected by Congress's amending CERCLA to add § 113(f)'s contribution claim (*id.* at 12a-15a, 21a).

Respondent's suggestion that the Second Circuit "did not confront the relationship between §§ 107 and 113" (Br. in Opp'n (i) (internal quotations omitted)) is confused. While the Second Circuit erred in its conclusions about that relationship, there is little else it considered. *See, e.g.*, Pet. App. 12a-13a (addressing "the relationship between section 107(a) and section 113(f)(1)" in distinguishing its holding in *Bedford Affiliates* v. *Sills*, 156 F.3d 416 (2d Cir. 1998), that PRPs are limited to contribution claims under § 113(f)); Pet. App. 15a n.9 (considering the possibility that a PRP claim under § 107(a) would be subject to a § 113(f) counterclaim); *id.* at 17a n.12 (considering relationship between its new § 107(a) claim and § 113(f)(1)'s statute of limitations). The Second Circuit's consideration of the relationship between § 107(a) and § 113(f) (or the perceived lack thereof) lies at the heart of

its analysis: it ruled that "section 107(a) is distinct and independent from section 113(f)(1)" (Pet. App. 14a) such that "whether a party in Con Ed's circumstances may sue under section 107(a) is easily resolved based on that section's plain language" (*id.*).

As the petition explains, however, the Second Circuit misread § 107(a)(4)(B)'s "any other person" language to include PRPs. Pet. 12. As the United States recently stated, "[t]he more logical reading is that 'any other person' [ ] excludes the four categories of PRPs listed in the first four paragraphs of section 107(a)." U.S. *Metro.* Br. at 10-11, 2006 WL 1354188, at *10-11. In misreading § 107(a) to afford PRPs a right of recovery unconstrained by § 113's contribution provisions, the Second Circuit's decision, as the Government explains, will "eliminate the finality Congress intended section 113(f)(2) to bring to the CERCLA settlement process and thereby reduce the incentive to settle." *Id.* at 20, 2006 WL 1354188, at *20.

5. The court of appeals' *sua sponte* decision that § 107(a) affords PRPs a cost recovery claim warrants review. Respondent's contention that review should be denied because "no issue reserved in *Aviall* was raised below" (Br. in Opp'n 3 (capitalization omitted)) is misplaced. The Court has frequently reviewed *sua sponte* decisions of the courts of appeals that, like the one below, raise important issues of federal law. *See, e.g., Dir., Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 125 (1995); *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 733-34 (1985); *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 610 (1978).

Also incorrect is respondent's suggestion that this case presents the § 107 issue in "much the same posture" (Br. in Opp'n 3) as did *Cooper Industries*. In *Cooper Industries*, the Court did not reach the § 107 issue because (i) no court below had decided the issue or addressed whether Aviall, the PRP, had waived it, 543 U.S. at 168-69, and (ii) the issue was

"well beyond the scope of the briefing and . . . the question presented," *id.* at 169. Here, those concerns are absent. There is no question that the Second Circuit reached and decided the issue and ruled further that respondent did not waive it. Pet. App. 21a-22a.[4] The issue is unquestionably presented in the petition and will be briefed fully should the Court grant review.[5]

Given the importance of the issue and the burdensome litigation it has and will spawn across the Nation, respondent's preferred approach of "allow[ing] *Aviall* itself to proceed in the normal remand course through the district court and the court of appeals" (Br. in Opp'n 5) is ill considered. *See Laing* v. *United States*, 423 U.S. 161, 167 (1976) (granting certiorari in part because numerous pending cases depended on resolution of conflict); *see also* ROBERT L. STERN ET AL.,

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[4] The Second Circuit's holding that the § 107 issue is jurisdictional and thus not subject to waiver (Pet. App. 22a) further empowers "voluntary" PRPs to argue that § 113(f) contribution claims that are defective under *Cooper Industries* should be transformed into § 107(a) cost recovery claims, regardless of how long those claims had been pleaded and litigated under § 113(f).

[5] Although respondent mentions that "the court of appeals remanded the case" (Br. in Opp'n 2), it appropriately makes no argument that the remand militates against review. *Cooper Industries* granted review and decided the § 113 issue in a similar posture, with the Court granting certiorari after the Fifth Circuit reinstated a § 113 claim. *See* 543 U.S. at 164-65. Indeed, the Court has repeatedly granted certiorari to review decisions of the courts of appeals that, like the decision below, would be final but for that court's erroneous construction of federal law. *See, e.g.*, *Cent. Bank* v. *First Interstate Bank*, 511 U.S. 164 (1994) (reviewing reversal of summary judgment and resolving issue, which Court had previously left undecided, of whether § 10(b) of the Securities Exchange Act of 1934 created a cause of action for aiding and abetting a violation of that section). *See also Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) ("The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" (quoting *Land* v. *Dollar*, 330 U.S. 731, 734 (1947)).

SUPREME COURT PRACTICE § 4.13, at 248 (8th ed. 2002) ("Importance may further be shown by demonstrating that the issue is novel or troublesome and is involved in numerous cases pending in lower courts, thereby making desirable an early and definitive ruling by the Supreme Court."). Even were there some benefit in awaiting the return of *Cooper Industries*, and respondent offers none, there can be no assurance that the parties in that case (or in any other) will persevere to seek certiorari on the § 107 issue. As it has in the past, the Court should grant certiorari in this subsequent case to consider the issue it earlier specifically reserved. *See, e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 379-80 & n.6 (1983) (certiorari granted to consider issue reserved in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 752 n.15 (1975)); *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401, 402 (1981) (certiorari granted to consider "important question of federal labor law" reserved in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 249 n.7 (1962)); *Warden, Lewisburg Penitentiary* v. *Marrero*, 417 U.S. 653, 656 (1974) (deciding question reserved in *Bradley* v. *United States*, 410 U.S. 605, 611 n.6 (1973)).

The importance of the CERCLA issue presented is evidenced both by the number of times the Second Circuit's decision has already been invoked by courts and litigants and by the fact that the United States has twice informed other courts of appeals that the decision is wrong. U.S. *Metro.* Br. at 18, 2006 WL 1354188, at *18; Br. of the Appellee at 47-50, *Atl. Research Corp.* v. *United States*, No. 05-3152 (8th Cir. Dec. 6, 2005) [hereinafter U.S. *Atl. Research* Br.], Pet. App. 167a-170a. Like petitioner, the United States has argued that in creating its § 107(a) "voluntary" PRP claim, the Second Circuit misconstrued CERCLA's text, structure, and history. U.S. *Metro.* Br. at 6-20, 2006 WL 1354188, at *6-20; U.S. *Atl. Research* Br. at 47-50, Pet. App. 167a-170a.

Although respondent suggests postponing resolution of the § 107 issue, delay in resolving it will make more difficult the

Government's administration of environmental cleanups, in addition to imposing substantial costs on the judicial system and its participants who will be forced to endure the issue's repeated visitation. Countervailing considerations to granting review are wholly lacking: The issue presented is an important matter of CERCLA construction that has been addressed by eleven courts of appeals. It is an issue that two Justices would have decided last Term even without the benefit of full briefing or a lower court decision, both of which this case presents. It is an issue that should now be resolved.

* * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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